Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-282

ARNOLD STONEHILL, MICHAEL GRUBER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Arnold Stonehill and Michael Gruber, pray that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on May 11, 1971.

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is not reported. A copy of the opinion appears in Appendix A. hereto.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit (Appendix A), was entered on May 11, 1971. The Petition for Rehearing was denied on June 31, 1971. This Petition for a Writ of Certiorari is herewith filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under Section 28 U.S.C., §1254(1); §1651(a).

Questions Presented.

Petitioners are innocent persons who have been subjected to the imposition of criminal sanctions under a judgment of conviction obtained contrary to petitioner's legal and constitutional rights. The questions presented in the light of the undisputed record are:

1. Whether the United States Court of Appeals for the Ninth Circuit correctly ruled that the evidence was sufficient to sustain the judgment.

2. Whether the United States Court of Appeals for the Ninth Circuit correctly ruled that the evidence was sufficient to find agency between the petitioners and their co-defendants.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the Fourteenth Amendment to the United States Constitution and the provisions of the United States Code, 26 U.S.C., §4705(a), at the time of the plea, are printed as Appendix B. hereto.

Statement.

On February 26, 1970, the Federal Grand Jury for the Central District of California returned a three-count indictment naming the petitioners Arnold Stonehill and Michael Gruber, and two others, Carmine Peter Giorgio and Steven Franklin Sabin, with three violations of Title 26, United States Code, §4705(a)—the sale of cocaine to Federal agents on November 7, 1969, December 2, 1969, and January 24, 1970.

On June 8, 1970, petitioners filed waivers of trial by jury. The matter then proceeded to trial before the Honorable William P. Gray, on June 9 and 11, 1970. On the latter date, motions for judgments of acquittal

as to petitioners were granted on Counts I and III and both were found guilty on Count II. On July 6, 1970, petitioners were sentenced to a term of five years imprisonment, the execution of sentence to be stayed pending appeal.

On June 16, 1970, Notice of Appeal was filed for petitioners, the United States Court of Appeals for the Ninth Circuit affirmed the ruling of the lower Court and denied petitioners Petition for Rehearing.

The verdict was sustained of the alleged facts that Federal Narcotics Agents working under cover, working through an undisclosed informant, purchased narcotics from the co-defendants but never from petitioners, who at the time of the sale, alleged in Count II, were in New York.

REASONS FOR GRANTING THE WRIT.

In order to sustain a criminal conviction the weight of the evidence must not be merely consistent with guilt but must support the conviction beyond a reasonable doubt.

Wright v. U.S., 227 Fed. 855.

The respondents herein do not contend that the petitioners were present when the December 2nd sale took place. The respondents contend, however, that the petitionrs aided and abetted on the commission of the offense, citing the cases of *Nye and Nissen v. United States*, 336 U.S. 613, 619, (1949); *United States v. Milby*, 400 F. 2d 702, 707, (9th Cir. 1968), as establishing their active participation in the criminal venture charged as encouraging the commission of the charged offense.

The petitioners contend that this reasoning and its proof as offered lacks a factual nexus between their co-defendants as their agents and themselves. Even if all the facts alleged by the respondents were admitted, there was no offer of proof to establish that the co-defendants, at the time of the offense charged, were acting within the course and scope of the criminal agency, or acting, in furtherance of any prior established criminal agency with petitioners.

It is consistent with petitioners' position, that their co-defendants were acting not as agents of petitioners but as principals in their own right. Petitioners have throughout, maintained their disassociation with their co-defendants. It is consistent with this contention that their co-defendants were not agents of the petitioners, but acting entirely for their own personal benefit and not within any criminal agency or conspiracy.

The evidence as presented in this case, is entirely circumstantial. It is arguable that where one is charged as a principal, having committed no overt act himself, the quantum of evidence required to sustain a criminal conviction based on the alleged overt acts of another, must necessarily be greater than that required where the evidence is direct. The burden is the same, but the relative strength of each evidentiary fact of direct evidence is substantially greater than that of circumstantial evidence. The petitioners' contention is that in considering the sufficiency of the evidence and the required burden of proof, the respondent has not met this burden nor proven guilt beyond a reasonable doubt.

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and ruling of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

PAUL CARUSO,
Attorney for Petitioner.

APPENDIX A.

United States District Court for the Central District of California.

United States of America v. Michael Gruber *No.* 5560-Criminal.

Filed: July 6, 1970.

On this 6th day of July, 1970 came the attorney for the government and the defendant appeared in person and by counsel, Paul Caruso.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a finding of guilty has been convicted of the offense of illegal sale of narcotics in violation of Title 26 U.S.C. 4705(a) as charged in Count 2 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on Count 2 of the Indictment.

IT IS ADJUDGED that pending appeal a stay of execution of the sentence of imprisonment is hereby granted.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

WILLIAM P. GRAY
United States District Judge.

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Before: HAMLEY, DUNIWAY and HUFSTEDLER, Circuit Judges PER CURIAM:

Appellants Stonehill and Gruber appeal from their convictions for violations of 26 U.S.C. §4705(a) (sale of cocaine without an order form). They challenge the sufficiency of the evidence to sustain their judgments.

We have examined the evidence in the light most favorable to the Government, and we conclude that the evidence is ample to support the convictions. (*United States v. Nelson* (9th Cir. 1969) 419 F.2d 1237). Although neither appellant personally participated in the transfer of cocaine, there was sufficient evidence from which the jury could properly have concluded that the transferor was appellants' agent.

The judgments are AFFIRMED.

APPENDIX C.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

"No state shall . . . . deprive any person of life, liberty, or property without due process of law; . . ."

2. Title 26 United States Code, Section 4705(a).

"(a) General requirement.—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."